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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

NO. 81-

MARGE PAYNE, et al.,

*Petitioner,*

-v-

BOBBIE BROOKS, INC.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James M. Mancini
Jefferson Centre - Suite 306
5001 Mayfield Road
Lyndhurst, Ohio 44124
(216) 382-9150
Attorney for Petitioners

## QUESTIONS PRESENTED FOR REVIEW

1. Is the standard of McDonnell-Douglas v. Green 411 U.S. 792 (1973), requiring plaintiffs to show that they applied for positions satisfied where union officials request reemployment on behalf of former employees who were recently severed due to a plant closing?

2. Did the Court of Appeals properly apply the standards of McDonnell-Douglas v. Green, 411 U.S. 792 (1973), in determining that petitioners had failed to establish a Title VII violation because they had not formally reapplied for employment after their employer had terminated them and had given them severance pay due to their plant being closed, but where it was shown that subsequent thereto the employer hired new white employees into positions for which petitioners were qualified at another nearby plant which had remained open and the employer never

notified petitioners of the openings although union officials had requested that petitioners be considered for the available positions?

3. To determine whether the futility doctrine as set forth in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct 1843 (1977), applies to a case where former employees ask their union officials to seek employment on their behalf and no other formal applications from the former employees are submitted?

4. Whether the futility doctrine set forth in International Brotherhood of Teamsters v. United States, 431 U.S. 324, (1977), is applicable to a situation where former employees first learning of new white employees being hired into positions for which they are qualified decide to initiate charges of discrimination with the Equal Employment Opportunity Commission

rather than filing formal applications for reemployment?

5. Is the futility doctrine as set forth in International Brotherhood of Teamsters v. United States 431 U.S. 324, (1977), applicable to a situation where petitioners are discouraged from reapplying for positions with their former employer because they are led to believe that there is no work available with their employer who closes their plant and severs them because of a business slowdown?

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IN THE
SUPREME COURT OF THE UNITED STATES
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NO.

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MARGE PAYNE, et al.,

Petitioners,

-v-

BOBBIE BROOKS, INC.,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Sixth Circuit

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming a decision of the United States District Court for the Northern District of Ohio, Eastern Division.

## OPINIONS BELOW

The opinion of the United States Court of Appeals has not yet been officially

reported. It is set forth in the Appendix, infra, at pp. A-58 - A-60. The opinion of the United States District Court can be found at 505 F. Supp. 707, (D.C. Ohio, 1980). It is also set forth in the Appendix, infra, at pp. A-1 - A-57.

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered and filed on April 7, 1982. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Sect. 1254(1).

## STATUTORY PROVISION INVOLVED

Title 42 U.S.C. Sect. 2000e, et sec., Title VII of the Civil Rights Act of 1964, as amended, and Title 42 U.S.C. Sect. 1981.

## STATEMENT OF THE CASE

The petitioners are a class of sixty-nine blacks who were severed from employment by the defendant company on or about January, 1976 from the respondent's Kelley

Avenue, Cleveland, Ohio Distribution Center. The Kelley Distribution Center always had a predominantly black work force.

The defendant also maintained a distribution center in Solon, Ohio which is a suburb of Cleveland, and which has less than a one percent black population. The Solon plant is located approximately thirty miles from the Cleveland plant. Both the Kelley and Solon plant employees performed the same duties.

The Solon Distribution Center was first opened on or about April, 1971 and always had a predominantly white work force.

In October, 1975, the defendant notified the International Ladies Garment Workers Union, who represented the Kelley employees, that the company had decided to close the Kelley Distribution Center and to keep open the Solon Distribution Center. The defendant decided to terminate 75 Kelley employees, including the

69 black petitioners herein and 6 white employees and to transfer 29 Kelley Distribution Center employees out to the Solon Distribution Center. The 29 Kelley Distribution Center employees who were transfered to Solon when the Kelley Plant was closed, were placed in a separate wing of the Solon facility which was separate from the Solon wing employees' work area.

The Director of Distribution, Charles Gabele, by a letter dated December 31, 1975, forwarded a severance letter and a severance check amounting to $20 per year of service to all 75 Kelley employees who were being severed.

The defendant company did not terminate or layoff any of the Solon Distribution Center employees. At the time that the petitioners were severed from the Kelley facility, the Solon Distribution Center had only one black employee.

Company officials told the union in October 1975 that the reason they were closing the Kelley Distribution Center was due to a business slowdown and a lack of work. The union officials requested that the Kelley employees be placed on a preferential hiring list for any positions that would become available at the Solon Distribution Center. The company rejected this request indicating that there would be no openings in the forseeable future. The union officials then requested severance pay for those Kelley employees who were to be terminated. This included employees who were still eligible for recall under the terms of the collective bargaining agreement between the company and the union. Under said agreement, employees could remain on layoff for up to one year without losing their seniority right and their right to recall.

Approximately 30 of the petitioners were employed at the Solon Distribution Center in September of 1975, immediately prior to their being severed. The Kelley employees with the exception of one or two were all placed on a third shift at Solon. While the Kelley employees were employed at Solon in September of 1975, certain racial problems developed between the white Solon employees and black Kelley employees.

Within one week after the racial problems developed between the Solon and Kelley employees in September of 1975, the company laid off all of the 30 Kelley employees who were working at Solon. The Kelley employees reamined on layoff until they were severed by the company in January of 1976.

During the last three months from October 1975 through the end of 1975, the

company continued to hire new employees at Solon. Approximately 41 new employees were hired at Solon during this time, nearly all of whom were white employees who had no prior work experience. None of the laid off Kelley employees who had worked at Solon were notified of any of these job openings.

After the petitioners herein were severed by the company, the company hired new employees to fill openings which occured at the Solon facility. During 1976 and up to August, 1977, when this instant lawsuit was filed, the defendant company hired 54 new employees at the Solon Distribution Center. From the period from January 1976 through December 1976, the defendant company hired 37 new employees, 35 of whom were white.

The new employees were hired by Charles Gabele, who was the same individual who had sent petitioners their

severance letter dated December 31, 1975. Gabele, as well as other company officials doing the hiring at Solon, admitted that they never notified any of the severed Kelley employees of the openings that became available at Solon during 1976 and up to August 1977.

In August, 1977, immediately after this lawsuit was initiated by petitioners, the defendant company notified all 69 class members of opportunities at the Solon Distribution Center. Approximately 25 to 30 of the severed Kelley employees returned to work at Solon in August or September, 1977.

Gabele admitted that the company relied on walk-in applicants to fill openings at Solon during 1976 and up to August, 1977. The defendant company did not advertise the job openings at Solon in any newspaper during this time. Because the city of Solon where the plant was

located was less than one percent black, most of the walk-in applicants were white.

Most significantly, throughout 1976 and 1977, two union officials continually asked Gabele to consider hiring the severed Kelley employees before hiring new applicants to fill openings which were occuring in Solon during this time. Al Gargiulo testified that in 1976 and 1977 he saw Gabele at least once or twice a week and on most of those occasions when he asked Gabele to consider hiring the severed Kelley employees for openings at Solon, Gabele never responded to Gargiulo's request and would merely attempt to avoid the question.

Defendant, at trial in the District Court, attempted to justify their refusal to rehire the petitioners herein by asserting that petitioners had failed to apply for positions at Solon after they had been severed from Kelley. The petitioners

responded during the trial that they had applied, through their union officials, for positions at Solon. Further, petitioners stated that it would have been futile for them to apply for positions because they had learned that the defendant company was hiring new white employees at Solon and they reasonably believed that they were being discriminated against because of their race.

The petitioners first learned of the new hiring at Solon in May or June of 1976 from another black employee who worked in another area at the defendants' Kelley Avenue facility. Immediately after petitioners first became aware of the defendants hiring new white employees at the Solon plant, they filed charges of discrimination with the Equal Employment Opportunity Commission. Petitioners charges allege that, " Whites have been hired at Solon subsequently on jobs for

which I am qualified."

Immediately after they were given their severance pay, the petitioners sought out their union officials for assistance. At a union meeting held in early January, 1976, the petitioners signed a paper indicating that they wanted their jobs back, or jobs at Solon. It was after this meeting that union officials went to the company to request that the company consider hiring the terminated petitioners for openings which were occuring at the Solon facility.

It was also established at the trial herein that a formal application was not always necessary for employment at the Solon facility. Several white employees were permitted to transfer from the Kelley plant to the Solon plant without having submitted formal applications for transfer. Further, many of the white employees hired at Solon during 1976 and 1977 were

hired well after they had first applied for positions at Solon. Some were not hired until approximately two months after they had submitted their applications. The defendant company had contended that the reason a formal application was necessary was to show a present interest in employment. Petitioners produced all of the applications of those hired at Solon during the period in question and they established that the defendant didn't always hire immediately after an application was submitted.

After trial and upon consideration of all of the evidence, the District Court concluded that because none of the petitioners had applied for positions at Solon after they were severed, they were not entitled to relief under Title VII of the 1964 Civil Rights Act or 42 U.S.C. Section 1981. The District Court relied

on McDonnell-Douglas v. Green 411 U.S. 792, (1973) stating that, "Intercession on behalf of the employees by the union leaders in 1975, 1976 or 1977, can not be considered an application." The District Court then concluded that the plaintiffs had failed to satisfy the application requirements set forth in the decision in McDonnell-Douglas Corp., v Green 411 U.S. 792, (1973).

Further, the District Court found that the futility doctrine as ennunciated in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843 (1977), did not apply in the instant case. The District Court stated that the futility doctrine did not apply because there was no evidence that petitioners believed it would have been futile for them to apply for positions at Solon due to discrimination.

Upon appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. The Court of Appeals found that petitioners had failed to formally apply for positions at Solon after they had been terminated and therefore had failed to satisfy the application requirement of McDonnell-Douglas v. Green. Further, the Sixth Circuit Court of Appeals determined that the futility doctrine did not apply in the instant case.

Petitioners seek to have this Court review the Sixth Circuit Court of Appeals decision with respect to its holding that petitioners burden of proof included establishing that they had formally applied for positions with the company after they had been severed. Further, petitioners seek to have the Court review the Sixth Circuit Court of Appeals decision that held that the futility doctrine did not apply.

## REASONS FOR GRANTING THE WRIT

1. To Resolve The Important Issue Concerning The Required Burden Of Proof In A Refusal To Hire Case Under Title VII, Where A Company Is Put On Notice By Union Officials That Former Employees Are Seeking Employment, But The Employer Does Not Consider The Former Employees For Job Openings Which Occur Because The Former Employees Had Not Submitted Formal Applications For Reemployment.

In McDonnell-Douglas v. Green, supra., this Court held that the necessary elements of proof required of plaintiff in establishing a prima facie case of hiring discrimination, included: 1) that plaintiffs show that they belong to a racial minority; 2) that they applied and were qualified for jobs for which the employer was seeking applicants; 3) that dispite their qualifications, they were rejected; and, 4) that after their rejection the position remained open and the employer continued to seek applicants.

The question presented in the instant case is whether petitioners satisfied their

burden of proof concerning the application requirement set forth in McDonnell-Douglas by establishing that defendant company supervisors were aware of petitioners desire for reemployment through requests made by their union officials.

It is the petitioners contention that if company supervisors doing the hiring at Solon knew that petitioners were seeking employment, then their failure to notify petitioners of openings at Solon for which they were qualified can only be considered discriminatory.

In Hansbury v. University of California 596 F. 2d 944, (10th Cir., 1979) the plaintiff did not formally apply for reemployment with defendant university after she had been laid off from her job. Subsequently, males with less qualifications were hired to fill openings for which plaintiff was qualified.

The Tenth Circuit held that if plaintiff could show that defendants were aware of her continued desire to be considered for employment, than, under the futility doctrine, it would constitute a functional equivalent of an application even though plaintiff had not in fact made such an application. The Court held that the company's awareness of plaintiff's desire for employment could constitute a functional equivalent of an application.

The evidence presented at trial in the District Court clearly established that defendant company supervisors who were responsible for hiring new employees at Solon were aware of petitioners desire for employment. First, the union officials made frequent inquiries with company supervisors requesting that they consider hiring the petitioners for openings at Solon.

Al Gargiulo, Union Business Agent, and

Chuck Dabila, Union Steward, both stated that they frequently asked Gabele throughout 1976 and 1977 to consider hiring the terminated petitioners from Kelley for positions that were available at the Solon Distribution Center. Gargiulo, whose testimony was credited by the District Court, testified that in 1976 and 1977 he met with Gabele at least once or twice a week and on most of those occasions he would ask Gabele to consider hiring the severed Kelley employees for openings at Solon. Gabele never responded to either Gargiulo's or Dabila's request and would merely attempt to avoid the question. Again, during this time, Gabele was hiring new white employees at Solon.

Further evidence that defendant company supervisors were aware of petitioners interest in seeking employment, is shown by the fact that the same supervisors that were doing the hiring at Solon were involved

in terminating the petitioners and in many cases had actually supervised the petitioners at the Kelley Distribution Center prior to their severance. In addition, several of the petitioners contacted company supervisors after they had been severed, requesting letters of reference to use in seeking employment elsewhere. The company supervisors never told any of these individuals requesting letters that there were openings at the Solon Distribution Center.

In Pearson v. Furnco Construction Co., 563 F.2d 815, (7th Cir., 1977) the Court held:

> "That plaintiffs had made Furnco sufficiently aware of their interest in firebrick jobs so that Furnco's failure to notify them..., could only have been a deliberate avoidance of considering plaintiffs for employment."

Further, petitioners contend that applicable labor decisions involving the National Labor Relations Board should be

controlling in the instant case. In N.L.R.B. v. Brown & Root, Inc., 203 F.2d 139, (8th Cir., 1953) the Eighth Circuit held that a union could represent striking employees in applying for reinstatement on their behalf. See also, Laidlaw Corp., v. N.L.R.B., 414 F.2d 99 (7th Cir. 1969).

2. To Clarify The Standard Applicable In A Title VII Case Involving Employees Being Severed Due To A Plant Closing And The Employer Then Hiring New Employees At A Nearby Plant Without Notifying The Former Employees Of The Openings For Which They Are Qualified

It is the contention of petitioners that the District Court and the Court of Appeals erred by placing too great a burden on the plaintiffs to establish that they had applied for positions at Solon after they had been severed in order to establish a Title VII violation. Petitioners contend that it was only necessary for them to establish that they were denied equal employment opportunities with respect to hiring

opportunities at the Solon plant during 1976 and up to August 1977.

As applied to a termination and then a subsequent refusal to rehire case, petitioners have argued that in order to establish a prima facie case of racial discrimination they need only show that they are members of a protected minority under Title VII, that they were terminated, and that they were qualified to fill positions from which they were terminated and that they were in effect, replaced with white employees. See Marks v. Prattco, Inc., 607 F.2d, 1153 (5th Cir., 1979); and Whiting v. Jackson State University, 616 F.2d, 116 (5th Cir., 1980).

This Court clearly set forth the full meaning of the term disparate treatment in International Brotherhood of Teamsters v. United States, supra., wherein it held;

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266, 97 S.Ct 555, 563-565. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. See e.g., 110 Cong. Rec. 13088 (1964) remarks of Sen. Humphrey, ("What the bill does...is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States")."

The District Court as well as the Court of Appeals did not correctly apply the law with respect to disparate treatment cases to the evidence as established on record. The lower courts only concerned themselves

with whether or not the plaintiffs had formally applied for positions at Solon after they had been severed which was not an issue crucial to determining whether or not plaintiffs were denied equal employment opportunities because of their race.

In Mitchell v. Mid-Continent-Spring Co., 583 F.2d, 275 (6th Cir., 1978) the Sixth Circuit considered the company's defense that there were no female applicants for promotion and therefore, the company never had occasion to discriminate. The Sixth Circuit held that:

> "The standard of this Circuit under Title VII is that females must have equal employment opportunities not merely that their applications, if any, be processed fairly."

The Sixth Circuit concluded that on the basis of substantial evidence, the defendant company exhibited the requisite disregard for the consequences of its acts to satisfy Title VII.

In this case, there is substantial evidence that petitioners were denied equal employment opportunities by the company because of their race. First, in October of 1975, when the defendant company first notified the union of its decision to close the Kelley Distribution Center, the defendant refused to abide by the union's request to place the Kelley employees on a preferential hiring list instead of terminating them.

One of the most significant evidentiary facts is that defendant company continued to hire new white employees at the Solon facility during the last three months of 1975 while at the same time they were in the process of terminating the Kelley employees. The defendant company did not offer an explanation as to why they continued to hire new employees at Solon during the same time period when they were in the process of severing the plaintiffs

herein. The petitioners were never offered the opportunity to transfer to positions at Solon during the last three months of 1975 because they were never notified of such openings.

After severing the Kelley employees, the defendant company continued to hire new employees at the Solon facility throughout 1976 and up to August 1977. Gabele and other company supervisors doing the hiring at Solon chose to ignore the experienced severed Kelley employees who were readily available to fill openings at Solon. Gabele admitted that the severed Kelley employees were more knowledgable about the positions at Solon than were the new applicants who were hired by the defendant.

Evidence of defendant denying equal employment opportunities at the Solon facility is clearly shown by the fact that Gabele as well as other company supervisors

failed to notify or even attempt to notify any of the severed Kelley employees of the openings and did not advertise job openings in any newspaper during this time. Because the city of Solon where the plant was located was less than one percent black, most of the walk-in applicants were white.

And most significantly, Gabele and the other company supervisors ignored the request of union officials to consider hiring the severed Kelley employees before hiring new applicants to fill the openings at Solon. Gabele's only explanation for refusing to notify any of the severed employees of openings at Solon was that he did not do so because the union had asked for severance pay for these employees.

Thus, under the standards set forth by this Court in disparate treatment cases, petitioners were only required to establish that they were members of a protected minority, that they were terminated, and that

they were qualified to fill positions for which whites were subsequently hired. Both the lower District Court and Court of Appeals applied the incorrect burden of proof required in disparate treatment cases. It was not essential for petitioners to have applied for positions at Solon subsequent to their being terminated due to a lack of work in order for petitioners to have established a Title VII violation. Rather, it was only essential that they establish that they were denied equal employment opportunity because of their race which the evidence clearly indicates.

3. To Clarify The Standard Applicable In A Title VII Case Concerning The Futility Doctrine And Whether Or Not It Applies To A Case Where Employees Are Led To Believe That There Is No Work Available By Their Employer Who Closed Their Plant And Severed Them Because Of A Business Slowdown And The Employees Request Their Union Officials To Seek Reemployment For Them But Subsequent Thereto, They Learn Of New Whites Being Hired At A Nearby Plant Into Positions For Which They Are Qualified, But Rather Than Formally Applying For Reemployment, They Immediately File Charges Of Race Discrimination

With The Equal Employment Opportunity Commission

This Court has specifically addressed the futility issue in International Brotherhood of Teamsters v. United States, supra., wherein the Court held that it was not absolutely essential for a claimant to formally apply for a job in order to be covered by the 1964 Civil Rights Act. The Court stated:

> "The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and prevasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups. A per se prohibition of relief to nonapplicants could thus put beyond the reach of equity the most invidious effects of employment discrimination--those that extend to the very hope of self-realization. Such per se limitation on the equitable powers granted to courts by Title VII would be manifestly inconsistent with the "historic purpose of equity to 'secure complete justice' and with the duty of courts in Title VII cases to render a decree which

> will so far as possible eliminate the discriminatory effects of the past." Albermarle Paper Co. v. Moody, 422 U.S. at 418.

The District Court found the futility doctrine did not apply in the instant case because the futility was not caused by discrimination but rather by an apparent lack of jobs. It is true that the petitioners were led to believe that they were being severed by the defendant due to a lack of work. Under these circumstances, they reasonably believed that it would have been futile for them to apply for positions with the defendant after they had been severed. However, they did ask their union officials to seek reemployment for them. The union officials never got back to petitioners after their request was made which again led petitioners to believe that there were no openings.

In Hansbury v. Regents of University of California, supra., the plaintiff alleged

in her E.E.O.C. complaint that she had been laid off from her job and that males with less qualification had been hired to fill openings subsequent to her layoff. The plaintiff in Hansbury did not formally reapply for reemployment with the defendant university. The Tenth Circuit however, held that if the plaintiff could show that the defendants were aware of her continuing desire for employment, then under the futility doctrine it would constitute a functional equivalent of an application even though plaintiff had not in fact made such an application. Specifically, the Tenth Circuit held:

> "Her theory is apparently based on the doctrine of 'futility', for she makes much of indications by LASL Personnel that she simply would not be considered again for employment at LASL. Under this doctrine, the plaintiff need not file applications in order to have standing to assert a Title VII claim, if doing so would be futile."

Likewise, in the instant case, the peti-

tioners did not have to file formal applications with the defendant after their termination in order to have standing to assert their Title VII claim. Like in Hansbury, the defendant by severing petitioners was indicating to petitioners that there were no jobs available for them.

It should also be noted that immediately after first learning that the defendant company was hiring whites at Solon, the petitioners filed charges of discrimination with the Equal Employment Opportunity Commission. The charges stated in part, that, "Whites have been hired at Solon subsequently on jobs for which I am qualified." Obviously, the petitioners were clearly stating in their charges of discrimination that they believed they were being discriminated against, and that it was futile for them to apply for positions at Solon for that reason.

In Hailes v. United Airlines, 464 F.2d 106, 1009 (5th Cir., 1972) the plaintiff, a male, charged sex discrimination in the hiring of stewardesses and flight attendants. Plaintiff had not even applied for a job but the court held that a complaint of sex discrimination need not allege that the plaintiff actually applied for and was rejected for a job but that it is sufficient to inculcate a reasonable belief on plaintiffs part that even applying for the job was futile.

Therefore, it is clear from the evidence that the reason petitioners thought it would be futile to apply for positions at Solon was because, 1) they had just been severed and had been told there was no work available; and, 2) they subsequently learned that new white employees were being hired at Solon immediately after they had been severed.

Pursuant to this Court's ruling in International Brotherhood of Teamsters v. United States, supra., the futility doctrine was applicable to the instant case. Under these circumstances, it was not necessary for petitioners to have actually formally applied for positions at Solon after their termination in order to have established a prima facie case of a Title VII violation.

## CONCLUSION

Petitioners submit that the decision of the Court of Appeals for the Sixth Circuit is in conflict with the rulings of this Court and with those of other Circuits. Petitioner therefore prays that this petition for writ of certiorari be granted.

Respectfully submitted,

James M. Mancini
Attorney for Petitioners
Jefferson Centre, Suite 306
5001 Mayfield Road
Lyndhurst, Ohio
(216)382-9150

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | |
|---|---|
| MARGE PAYNE, et al., and BARBARA JONES, | CASE NO. C77-822<br>CASE NO. C77-1008 |
| Plaintiffs, | |
| v. | Judge John M. Manos |
| BOBBIE BROOKS, INC., et al., | |
| Defendants. | ORDER |

The plaintiffs in the above-captioned race discrimination action represent the class of all blacks formerly employed by the defendant company, Bobbie Brooks, Inc., at its Kelley Avenue, Cleveland, Ohio distribution center who were terminated on or about January 1976. Plaintiffs originally initiated this case as a class action on August 2, 1977, alleging that the defendant discriminated against the class in violation of 42 U.S.C. Sec. 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. Se. 2000e et seq. On February 24, 1978 this court conditionally certified the class.

Commencing on September 15, 1980 the class claims of discrimination were heard in a trail to the court.

On September 19, 1977 Barbara Jones, one of the black Kelley employees who was terminated in January 1976, filed a separate cause of action alleging race discrimination against Bobbie Brooks. Her claim was tried on the same facts as the class action.

At the close of plaintiffs' case, defendants made a motion to dismiss under Rule 41(b) FED.R.CIV.P. The court denied the motion and continued to hear evidence. At the close of all the evidence, on September 26, 1980 the court took the case under advisement and the parties submitted post-trial briefs.

Upon due consideration of the briefs of the parties, the exhibits and testimony adduced at trial, the court finds that judgment should be entered for the defendant on each of the claims of race discrimination.

The following finds of fact and conclusions of law are filed in accordance with Rule 52(a).

FINDINGS OF FACT

All of the plaintiffs worked at defendant's distribution center at Kelley Avenue (Kelley). They allege that Bobbie Brookes, Inc. discriminated against them because of their race by preventing them from working at the company's distribution plant in Solon, Ohio. Specifically they allege that Bobbie Brooks' no-transfer policy between the Kelley and Solon plants, as well as the company's recruiting policies, operated to exclude them and other blacks from working at Solon, where supposedly job opportunities and security were better. The class further alleges that Bobbie Brooks discriminated against them by terminating sixty-nine black employees from Kelley in early January 1976. Finally, the class alleges that Brooks discriminated against them by refusing to recall or rehire laid-off or severed Kelley employees for

openings which occurred at Solon in 1975, 1976 and 1977. The class alleges that in so doing Bobbie Brooks established a practice or policy of discrimination which continued from 1971 through 1977.

In early 1971 the business demands on Bobbie Brooks had exceeded the capacity of its sole northern Ohio distribution center located at Kelley Avenue. A business forecast for the company predicated that in 1972 Bobbie Brooks would be producing 2.4 million units per month, but that Kelley had a present capacity of 1.9 million units per month. Accordingly, the company had to expand and sent Tony Ferrante, Director of Distribution, to locate a suitable buiding for expansion. He first thoroughly examined sites near Kelley Avenue but all these locations were unsuitable, were of the wrong design, were too small or too dirty. Next he examined buildings in Twinsburg and Solon. The Solon site was ideal for the necessary expansion,

and it was selected by Brooks.

The parties stipulated that al all relevant times the population in Solon was less than one percent black, that the population around Kelley was predominantly black, and that a majority of the work force at Kelley was black.

Before the Solon distribution center opened in March 1971, Brooks sent out several Kelley employees to set up the plant. Carlos Dabila, a Spanish surnamed American, and Clifford Hicks, a black, were among these employees. To staff Solon, Maurice Saltzman, Chairman of the Board of Bobbie Brooks, ordered that every consideration be given to Kelley employees for positions at Solon.

Accordingly in February and March 1971 Tony Ferrante held two meetings at Kelley in which he explained to the employees that the company was opening a new distribution center in Solon and that the company was offering them the right to transfer to the new plant.

Those who transferred would have senior seniority because they would be the first out there. He also mentioned that the work at Solon used a more manual system and that there would be no air conditioning or tile floors. For the first few months, while time studies were being conducted, there would be no incentive wages, but that the average hourly wage would be protected. In addition to the two meetings, notices about the transfer offer were posted on the bulletin board, and the employees communicated the offer by word of mouth.

However, response to the transfer offer was very sparse; only two white employees, Wilma Poteed and Bernard Schonfield, applied for and received transfers. In March, Polly Wright, another black employee, asked for a transfer which was initially rejected by the company. She then filed a grievance with the union.

Afterwards the company informed her that one of the persons employed at Solon had not reported and allowed the transfer.

Rhoda Smith, a black, talked to both Ferrante and her supervisor, Hicks, about transferring to Solon. Both explained to her that her job out at Solon would be much manual and that they believed she could not handle it. Instead they suggested that she transfer to an incentive wage job at Solon. They reiterated what the necessary, but temporary, reduction in pay would mean white the time studies were being conducted and that in the long run, the incentive job would earn more. Smith testified that after hearing this she became discouraged and gave up the idea of transferring. But at no time did anyone tell her she could not transfer out to Solon.

Nora Holden, a black, testified that when whe inquired about transferring she was either given no response, or told:

"You don't want to go out there." Dorothy Reeves, a black, testified that when she asked her supervisor about transferring, he told her that it was not the same type of job. However, Reeves also said that a few weeks later the company asked her to go to Solon to help train new employees.

Because there were so few transfers applied for from Kelley to Solon and because of the need to form a work force at Solon, Bobbie Brooks began hiring at Solon and instituted a no-transfer policy on March 30, 1971 between Kelley and Solon. Ferrante testified that the no-transfer policy was necessary to build a stable work force at Solon. The threat that Kelley employees could transfer to Solon with senior seniority and bump Solon employees would undermine forming a stable work force at Solon.

To fill the first twenty positions at Solon, Bobbie Brooks advertised in suburban

newspapers and accepted walk-in applicants. Two blacks were initially hired, a Viet Nam veteran and another who did not report for work. In April 1971 Brooks reassigned two black supervisors, Clifford Hicks and Earlie Goldman, to Solon. The company also placed the sweater inspection department, which included three blacks, out at Solon. The company also had four Kelley employees go to Solon to help train the new employees. Of these four, two were Spanish, de Jesu and Carabella, and one was black, Crystal Foster. Bobbie Brooks implored the four to stay, but they refused. Thus, Ferrante estimated that of the original twenty-six or twenty-seven employees at Solon, six or seven were black. The parties stipulated that from April 1971 through January 1, 1972 the work force at Solon was composed of fifteen percent blacks.

In April 1971 Bobbie Brooks began contract negotiations for the Solon plant

with the International Ladies Garment Workers Union, which also represented the Kelley employees. The company and the union agreed that Solon would have a separate local and a separate seniority list. Arrangements for separate locals and seniority lists are not uncommon in the industry. The union contracts for Kelley and Solon were otherwise identical. Local 29 represented Kelley; Local 52 represented Solon.

Helena Watson, a black Kelley employee, testified that between 1972 and early 1974 she inquired several times about a transfer to Solon. Each time she was told to talk to her union officials or that the company would get back to her. She was never given the transfer, but Al Garguilo, a union official, once successfully arranged for her to transfer to another department at Kelley, so she could improve her seniority status.

In 1973 Richard Grejtak, a white part-time employee, who worked four to five hours a night at Kelley, was told that he might be laid-off. A few days later, John Pristach, a Bobbie Brooks official, called him and told him he could work out at Solon. Jim Bongalis, a company supervisor, testified that Grejtak applied for a job out at Solon and in the fall of 1973 began working there.

In January 1974 the union contract at Kelley was renegotiated. One of the union demands was that the Kelley and Solon seniority lists be merged. This issue was resolved by a letter agreement dated January 1, 1974 which stated that if the Solon plant was physically expanded, or expanded by way of "tiering" and because of such expansion, additional jobs are created, employees of Kelley, then on lay-off shall have the right to apply for such jobs and shall have equal rights to such jobs

along with other applicants. Any dispute regarding the application of the letter agreement would be subject to the grievance procedure. The company and the union resolved all other issues and the employees ratified the new contract. The differences between the Kelley contract and the Solon contract were minimal and not relevant to this case.

Beginning in 1974 and continuing through 1975, 1976, and 1977, Bobbie Brooks suffered a severe business decline. Net income fell from $109,000 for the year ending April 30, 1974 to a loss of $5,727,000 for the year ending April 30, 1975. As a result Brooks was forced to lay-off many of its employees; most of these lay-offs occurred at Kelley. In fact, by August 1975, sixty-seven Kelley employees were on lay-off. The union contract provided that a laid-off employee had a right to be recalled for a year after his lay-off date. If a

year elapsed without the employee being recalled, he lost all of his benefits, including his seniority and would be terminated.

Thus, during 1975 Al Garguilo and Carlos Dabila, two union officials, asked Charles Gebele, Director of Distribution, to employ some of the laid-off Kelley workers at Solon. Usually Mr. Gabele would give no definite answer. But following one such request in September 1975, Gabele told Garguilo that he would use some of the laid-off Kelley people to eliminate a back-log which had developed at the Solon plant. Approximately thirty Kelley employees went out to Solon. Six worked on the second shift and the rest were on the third shift. The work lasted for about three to six weeks in September and October 1975. The employees admitted in their testimony that they knew the work was only temporary. One Kelley employee testifed that Mr. Bongalis

said that he hoped the employment would be permanent, but Bongalis denied ever making such a statement. That there was extra work in September and October 1975 is not suprising. Rosa Nell James testified that January, June and September were busy months and that the company would often hire temporary people to help during those months.

Plaintiffs claim that while the mainly black employees from Kelley were working at the mainly white Solon plant, two racial incidents happened. First, the Kelley employees complained that the white employees on the earlier shifts were grabbing all the good jobs. Al garguilo investigated this complaint and learned that all the employees were equally guilty of trying to grab all the good jobs. Second, some of the Solon employees were spraying disinfectant at their work areas. However, Johnnie Johnson testified that the spraying

was done as the Solon employees were leaving. Upon investigation Garguilo learned that the spray was for mildew; this was also done at Kelley. Race was not a factor in these actions at the Solon plant.

By the end of October all the Kelley employees who had worked at Solon, were on lay-off again. Throughout the rest of 1975 some hiring was done at the Solon plant. Bobbie Brooks, however, was under no obligation to notify the laid-off Kelley employees of these openings or to bring the laid-off employees to the Solon plant. The collective bargaining agreement between the union and Bobbie Brooks specifies that the seniority and recall provisions apply only to individual plants. There are no interplant rights. Moreover, for the rest of 1975 none of the laid-off employees made an application for a job at Solon.

Bobbie Brooks studied various proposals to cut costs. These ideas included moving

the entire operation to Atlanta, constructing a new distribution building at Kelley and implementing new systems there. However, the efficiency of the Solon plant and the system used there over the system used at Kelley dictated that operations be terminated at Kelley and moved to Solon. Kelley used a conveyer belt system, which forced the distibution orders to go through the entire plant before the order would be completely finished. Solon relied on a more manual intensive system, in which workers would process the orders without having the order go through the entire plant. At Kelley the labor cost per unit in May 1975 was 11.11 cents,[1] this was 108.3% of what the planned cost was anticipated to be. In contract the Solon plant's labor cost per unit was only 5.9 cents,[2] this was 76.9% of what the

1 These figures exclude supervision costs.

2 These figures exclude supervision costs.

planned cost was anticipated to be. The company officials estimated that almost $500,000 could be saved in distribution costs. Therefore, toward the end of 1975, the decision was made to close the Kelley plant and move the existing Kelley operations to Solon.

At a union meeting in October 1975 some laid-off Kelley employees said that they wanted severance pay. By this time a number of employees had been on lay-off for almost a year and were aware that they would soon be terminated and lose all their benefits. Helena Watson testified that at the same meeting other employees said that they wanted their jobs rather than severance pay. Al Garguilo said he would look into it.

On October 29, 1975 union and company leaders met.[3] Garguilo testified that he asked the company to put the laid-off

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3 By this time six employees had been on lay-off for more than a year.

Kelley workers on a preferential hiring list. He claims that the company rejected this idea. The company officials have no recollection of such a demand. But all parties agree that the union did ask for severance pay. The company officials initially rejected the severance pay proposal by stating that they had no duty to pay severance, that business was bad, and that more lay-offs in the near future would be necessary. The company offered to retain the seniority lists, and call back the employees as needs arose. Finally, the company stated that it would cooperate with the union in any way possible so as to insure that eligibile employees could receive union severance fund payments, so long as there was no extra cost to the company. At this meeting the company also informed the union of its decision to transfer Kelley operations out to Solon. This transfer would occur after the first

of the year and be a gradual one. The company promised to keep the union informed on the progression of the transfer.

At subsequent meetings the union bargained and arranged for the company to pay severance. Some employees would receive $20.00 for each year of service; another group would receive $50.00. Company lawyer, Robert Rosenfeld, testified that this was more than what other Bobbie Brooks employees received who were severed at about the same time in other parts of the country.

Bobbie Brooks sent the notices of termination and the severance checks to seventy-five Kelley employees on December 31, 1975. Of these seventy five only six were white. The Kelley employees received the checks from January 2 to January 5, 1976. Some like Helena Watson and Katie Smith cashed their checks on January 2. Dolores Kinney and Geneva Salters testified that they received their checks on January 5.

Rhoda Smith testified that after she received her severance check, she called Jim Bongalis and asked for a job at Solon. She claims that Bongalis transferred her to Gabele, who told her: "You don't have a job here." Both Bongalis and Gabele denied ever having such a conversation with Smith.

Helena Watson testified that after she received her severance check, she called Al Garguilo and asked about a transfer to Solon. Garguilo told her that business was bad right then and that she should wait a little and then go out to Solon and apply there. Garguilo testified that he gave similar advice to any employee who asked. He emphasized that the union was not a hiring hall.

On January 6, 1976 about twenty Kelley employees went first to the National Labor Relations Board to file a complaint. When the Board told them that they needed

a copy of the contract, they went to the union hall. At the union hall Sam Janis held a meeting to discover the employees' preferences. He gave the employees a yellow legal-size sheet of paper and asked them to put down their names and whether they wanted the severance pay or their jobs back. Most of the employees wrote down that they wanted their jobs.

However, the union never got back to the employees on the matter of getting their jobs back. On January 15, 1976 the union held another meeting, but it was only for the purpose of getting information for supplemental employment benefits. When Helena Watson asked Garguilo about jobs, he replied that he didn't have the information.

Beginning in March 1976 and continuing through July 1976, the remaining twenty-nine employees who were still working at Kelley Avenue were transferred in groups

to Solon. Of these twenty-nine, fifteen were black. These employees were established in the K-wing of the Solon facility.[4] The two wings operated independently of each other. Local 29 continued to represent the employees in the K-wing and Local 52, the employees in the S-wing. Each wing retained its own seniority list.[5] Each wing hired independently. There were no transfers between the K-wing and S-wing. Nor were notices of openings in the S-wing posted in the K-wing.

In 1976 and 1977 people were hired at the Solon building. Throughout this period

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4 Bobbie Brooks' facility at Solon was a U-shaped building. Its original Solon operation was in one prong of the building and K-wing was in the other prong. In the base of the "U" between the two prongs was another business. Thus, the wings were physically separated.

5 At the time of the move from Kelley to Solon, Sam Janis in a conversation with Rosenfeld stated that at that time the union wanted separate seniority lists. But if the two plants were ever physically merged, the union would want the seniority lists merged. Rosenfeld said the company would examine that problem when it came to it.

sixty percent of the new hires were temporary. Bobbie Brooks often relied on Manpower and Victor Temporaries to supply these temporary needs. Business was still generally bad in this period. In 1976 no one was hired in the K-wing. In the S-wing in 1976 a total of fifty people were hired, but a total of sixty-six were terminated. The company was able to meet all of its personnel requirements by relying on walk-in applicants or by word of mouth. The company did not advertise in the newspaper or other media.[6] Between January 1, 1976 and August 13, 1977 a total of ninety-eight people were hired at Solon. By stipulation the parties agreed that of these ninety-eight, fifteen were black.

From early 1976 and continuing through 1977, various severed employees asked

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6 From 1971 to 1974 Bobbie Brooks did advertise in various suburban newspapers. After September 1974 Brooks ceased such advertising. Employees often spread notices of openings by word of mouth; relative of both employees and management were often referred to Brooks and were hired.

Bobbie Brooks for letters of recommendation. Most of the employees received the letters. However, the company did not inform the employees of any job openings at Solon, when they requested the letters.

Union leaders, Al Garguilo and Carlos Dabila, testified that throughout 1976 and 1977 that they continually petitioned the company to rehire the severed Kelley employees, but to no avail. Dabila stated that Gabele at first refused their requests and then gave no reply. Garguilo said that he saw Gabele at least once a week and he inquired about rehiring the Kelley employees about eighty percent of the time. However, Gabale, Pristach and Rosenfeld in their testimony all positively denied that either Garguilo or Dabila ever asked them in 1976 or 1977 to rehire the severed Kelley employees.

Bobbie Brooks admitted that they never considered rehiring the Kelley employees because the union had asked for severance

pay. Rosenfeld noted that the union wanted the severance pay so that it could pay the union supplemental benefits. A condition to these supplemental benefits was that if the terminating employer rehired within six months, the employees could not receive the union benefits.

No severed Kelley employee ever went out to Solon and filled out an application.[7] This court finds that none of the severed employees ever applied for a job at Solon.[8]

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7 Filling out an application is an essential element in Bobbie Brooks' hiring policies. Whenever an opening occurred, the hiring supervisor would review the most recent application and evaluate the applicants on qualification and prior work experience. An interview would follow and the hiring decision would then be made. Because the personnel were usually needed immediately (or in the very near future), Brooks had to have someone with a present interest in the job. Thus, by relying on the recent applications, Brooks could meet its need of filling positions quickly.

8 Some of the employees gave different reasons why they did not apply. Katie Smith testified that she believed the company had a duty to recall because of the one-year clause in the union contract. Johnnie Johnson did not apply at Solon because the unemployment compensation was better.

Signing the yellow legal-size sheet at the union meeting was not enough to apply. Asking the company for letters of reference is not an application. Nor could union officials asking Bobbie Brooks to rehire the severed employees be considered an application. If while the Kelley employees were on lay-off Bobbie Brooks had no duty to inform them of openings at Solon, after termination the company certainly had no duty to notify them of openings.

On June 1976 Eaton Whitehead, a black employee at the K-wing, called Helena Watson and told her that white employees were being hired at Solon. They organized a meeting at a church with other severed Kelley employees to discuss their rights and what actions could be taken. On July 2, 1976 a number of severed Kelley employees filed complaints with the Equal Employment Opportunity Commission.

In August 1977 Bobbie Brooks' legal

department, as part of settlement negotiations with the EEOC, advised the company to rehire the severed employees when the need arose. Because of improving economic conditions, the company decided to rehire all the severed employees and assign them to Solon. Over the course of several weeks, John Pristach called the severed employees from a list given him by the legal department. Of the seventy-five employees, twenty-six returned to employment with Bobbie Brooks. The employees were not given full seniority, except for benefits.

In 1978 because of cintinual improvement with the business, Bobbie Brooks' inability to rent the Kelley property, the prospect of renting the Solon facility and other business reasons, both the K-wing and the S-wing were transferred from Solon to Kelley. All Solon employees retained their full seniority and the seniority lists of both wings were merged, at the request of the union.

CONCLUSIONS OF LAW

Defendant, Bobbie Brooks, questions plaintiffs timely filing with the EEOC. Plaintiffs counter by asserting that Bobbie Brooks committed separate, independent violations after the termination, that Brooks committed continuing violations and that there are equitable grounds for tolling the time limitations. This court accepts jurisdiction.

The plaintiffs base their claims for recovery on Title VII, 42 U.S.C. S 2000e et seq under both the disparate treatment theory and the disparate inpact theory. They also seek recovery under 42 U.S.C. S 1981.

In International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843 (1977), the Court distinguished between disparate treatment and disparate impact cases under Title VII. It so noted:

"Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266, 97 S. Ct. 555, 563-565. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. See, e.g., 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey) ("What the bill does...is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States").

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employemnt practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. See infra, at 1861. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Compare e.g., Griggs v. Duke Power Co., 401 U.S. 424, 430-432, 91 S. Ct. 849, 853-854, with McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-806, 93 S. Ct. 1817, 1824-1826.

431 U.S. at 335, 97 S. Ct. 1854, n. 15.

The Title VII claims of disparate treatment must be evaluated in accordance with the leading decision in McDonnell Douglas Corp v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), in which the Supreme Court held:

> The complaint in a Title VII trail must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (II) that he applied and was qualified for a job for which the employer was seeking applicants, (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complaints qualifications....9
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> The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection....

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9 In a foot note accompanying this passage, the court noted that "(t) he facts will necessarily vary in Title VII cases, and the specification above of the prima facie proof required from (the plaintiff) is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802, 97 S. Ct. at 1824, n. 13.

> (If a legitimate, nondiscriminatory basis for the employer's action is articulated, the plaintiff must) be afforded a fair opportunity to show that (the employer's) stated reason for (the plaintiff's) rejection was in fact pretext (for discrimination).

411 U.S. 802-804, 97 S. Ct. 1824-1825.

Proving a prima facie case under McDonnel Douglas establishes the critical finding of discriminatory motive because such a showing creates "an inference that an employment decision was based on a discriminatory criterion illegal under the act." Teamsters, 431 U.S. at 358, 97 S. Ct. 1866. In Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S. Ct. 2943 (1978), the court elaborated on its reasoning, by holding that a prima facie showing under McDonnell Douglas "is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that these actions were bottomed on impermissible considerations."

Plaintiffs endeavored to establish a prima facie case in regard to the hiring practices of Bobbie Brooks at the Solon facility for 1975 through August 1977. The plaintiffs are members of a racial minority. The work done at Solon was very similar to the work done at Kelley, and plaintiffs could master such work after only a few days training. Therefore plaintiffs were qualified for openings at the Solon facility. Throughout the period Bobbie Brooks accepted applications and hired a number of people. Most of those hired were only temporary.

However, at the end of the case, the court found that what the plaintiffs believed were applications were not applications at all, and that they never applied for positions at Solon. The actual filing of an application at the plant was an indispensable element of Bobbie Brooks' hiring procedure at Solon: having a recent application on file permitted the company to fill

openings with the required quickness. Thus asking for a letter of reference cannot be considered an application. The few isolated calls, by some of the plaintiffs inquiring why they were terminated and about jobs at Solon, cannot be considered an application. A severed employee writing on a yellow legal-size sheet of paper at a union meeting that he would like his job back cannot be considered a job application. There was no evidence presented that company officials even saw the list. Intercession on behalf of the employees by the union leaders in 1975, 1976 or 1977 cannot be considered an application. In 1975 Bobbie Brooks under the collective bargaining agreement had no obligation to transfer employees from one plant to another. After the termination the employees were like any other potential applicant. To be considered for a job they would have to apply formally. Al Garguilo testified that he advised the

employees to apply at Solon. He also specifically denied that the union was a hiring hall. No severed employee applied for a job at Solon.

Plaintiffs cite Chavez v. Tempe U. High Sch. Dist. No. 213, 565 F.2d 1087 (9th Cir. 1977) for the principle that informal inquiries about a job can constitute an application. Chavez can be distinguished and is not applicable to the present case. In Chavez a high school teacher discussed an opening for a department chairmanship with the school principal in the principal's office. The court held that "(i) n light of the district's informal application procedures, (this)...discussion... must be held to constitute an application." 565 F.2d at 1092. The record contained evidence that teachers could apply for such position "simply by speaking" to the principal. Bobbie Brooks' application procedures were not so informal and required that an

application be filled out. Thus informal inquiries could not be considered an application.

In Teamsters, supra, the court drew a narrow exception to the application requirement under McDonnell Douglas. It held that if a consistently enforced discriminatory policy deters job applications from minorities because they "are unwilling to subject themselves to the humiliation of explicit and certain rejection," potential applicants need not apply for the job to be provided the same presumption as an applicant under McDonnell Douglas. The court limited this exception to "(v)ictims of gross and pervasive discrimination." 431 U.S. at 367, 97 S. Ct. at 1871. This exception is not applicable to plaintiffs and Bobbie Brooks. That plaintiffs knew that they would be victims of "gross and pervasive discrimination" is not the reason whey they failed to apply. Only two

witnesses testified on why they did not apply. One said that unemployment compensation was better; the other believed that the company had a duty to call her back. Nor did Bobbie Brooks institute a gross and pervasive system of discrimination which would deter black applicants. The unions advice to apply at Solon, and Bobbie Brooks' hiring of blacks at Kelley and Solon prove that there was no such discrimination.

Plaintiffs cite Hansbury v. Regents of Univ. of Cal.,596 F.2d 944 (10th Cir. 1979) for the proposition that if a "plaintiff could show that the defendants were aware of her continuing desire to be considered for employment..., this showing could constitute the functional equivalent of an application." Id. at 949. However, plaintiffs' reliance on this case is misplaced. In Hansbury the plaintiff alleged that in 1970, because of sexual discrimination, she was laid-off from her job at the

Los Almos Scientific Laboratory (LASL), which at that time was exempted from Title VII. She filed a complaint with the EEOC, which in November 1972 dismissed the claim on the ground it lacked jurisdiction at the time the charge was filed. By that time LASL had lost its exemption. Plaintiff immediately filed again with the EEOC, which determined that a violation occurred. The district court granted the defendant's motion to dismiss. On appeal the plaintiff proposed several theories of post lay-off continuing discrimination to show that she had filed timely. The first was that LASL has discriminately applied its recall policy. The court accepted this theory. The court went further and analyzed plaintiff's second theory that LASL had discriminately refused her new employment after the 1972 amendments had taken effect. The court noted that there was difficulty with this theory because plaintiff filed her last

formal application in 1970. The court then inferred "(h)er theory is apparently based on the doctrine of 'futility,' and cited Macklin v. Spectoe Freight System, Inc., 478 F.2d 979, 988 (D.C. Cir. 1973) and Bordreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971), for support. Both of these cases present situations of gross and pervasive discriminations as provided for in Teamsters, supra. The court noted then that even the futility doctrine posed problems for the plaintiff because there were no cases which "(applied) the futility doctrine to situations where the futility arose before the employer's refusal to hire was made illegal under Title VII." 596 F.2d at 949. The court then held that an employer's awareness of the employee's continuing desire to be hired could be considered the functional equivalent of an application.

The fact situation of Hansbury is not present in this case. First, as already shown, the requisite futility because of race discrimination did not exist. Second, Bobbie Brooks was not initially exempted from Title VII. The Tenth Circuit placed special importance on this fact in concluding that the futility doctrine was not an edequate solution for plaintiff's situation. Third, the court was tenative in its holding: The "awareness could constitute the functional equivalent of an application." Because of Bobbie Brooks' pecular needs often to fill temporary positions quickly, functional equivalents would not be sufficient. Brooks had to know who was willing to take a job right then. A scientific laboratory can take more time in its selection.

Moreover, the Tenth Circuit's ruling was not necessary for its decision. What plaintiffs in this case rely on is the

court's analysis of Hansbury's alternative theory. In her EEOC complaint, Hansbury stated that she had been laid-off and not recalled. The court emphasized this in its opinion and held that a discriminatory recall policy would be grounds for relief.

Plaintiff also argues that by terminating the Kelley employees, sending severance pay, and closing the Kelley plant Bobbie Brooks "was indicating to plaintiffs that there would be no jobs available for them in the future", (Plaintiff's post-trial brief, p.19) and it was futile to apply. The plaintiffs then conclude that the futility doctrine should apply. However, Teamsters and the other cases which plaintiffs cite, Hailes v. United Airlines 464 F.2d 1006 (5th Cir. 1972) and Hairston v. McQueen Trucking Co., 529 F.2d 226 (4th Cir. 1975), hold that the futility must be caused by

discrimination, not an apparent lack of jobs. In the present case the union advice to apply at Solon and Bobbie Brooks' hiring of blacks there demonstrate that there was not the requisite discrimination.

Plaintiffs have not cited and this court has not found any other cases which would relax the application requirement of McDonnell Douglas. Therefore, because plaintiffs did not apply for a position at Solon, they have failed to establish a prima facie case under the disparate treatment theory of Title VII.

Title VII also provides for a disparate impact theory of recovery. The Supreme Court first enunciated this principle in Griggs v. Duke Power Company, 401 U.S. 424, 91 S. Ct. 849 (1971), when it held: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The toughstone is business

necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431, 91 S. Ct. at 853. The court further held that the plaintiff, in establishing that an employment practice is discriminatory, does not have to prove discriminatory intent or motive: "...absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups..." 401 U.S. at 432, 91 S.Ct. at 854. In Teamsters, supra, the Court restated its holding: "(Claims of disparate impact) involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity...Proof of discriminatory motive, we have held, is

not required under a disparate theory."

After the plaintiffs have established the disparate impact of the practice, the employer has the opportunity to prove business necessity. The courts have held the following to be the standard for business necessity:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish it equally well with a lesser differential racial impact. Robinson v. Lorillard Co., 474 F.2d 791 at 798 (4th Cir. 1971) and Head v. Timken Roller Bearing Co. 486 F.2d 870 at 874 (6th Cir. 1973).

Under this theory plaintiffs assert that Bobbie Brooks' hiring procedures and its no-transfer policy had a disparate impact on the black employees at Kelley. The hiring procedures of relying on walk-in applicants, many of whom were relatives

of employees or management or had heard of the job by word of mouth, and of advertising only in surburban newspapers, caused mainly blacks to staff the Kelley plant and mainly whites to staff the Solon plant. The no-transfer policy prevented blacks from leaving Kelley and going to Solon, where plaintiffs allege that job opportunities and job security were better.

The hiring practice and the no-transfer policy are neutral on their face. But under these facts, the policies, in the words of Teamsters, did not "fall more harshly on one group than another." The hiring procedure permitted large numbers of both races to be employed by Bobbie Brooks under almost identical working conditions and almost identical chances for opportunity and security. The geographic distribution of the races in the greater Cleveland area caused the plant to be staffed primarily be different races,

but even then the evidence shows that both plants were intergrated. The real causes of any disparate impact between the races were the severe economic trouble of Bobbie Brooks and the efficiency of the Solon plant over the Kelley plant.

Plaintiffs rely heavily on U.S. v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Rock v. Norfolk and Western Railway Company, 473 F.2d 1344 (7th Cir. 1973) and United Transfer v. Loc. No. 974 v. Norfolk and W. Ry., 532 F.2d 336 (7th Cir. 1975)[7] to prove the disparate impact of such procedures. In Norfolk and Western the railroad had two adjacent terminal yards. Whites predominantly staffed the CT yard; blacks predominantly staffed the Barney yard. Each yard was represented by different locals of the same union. At both yards the classes of employees were

7 The two Norfolk and Western cases arise from the same facts; the 1975 case is an appeal from the remand of the 1973 decision.

brakemen, conductors and car retarder operators. The rates of pay were the same for both yards. The railroad practiced no active recruitment. Thus any vacancies were quickly filled by word of mouth or by relatives of present employees. Also a no-transfer policy essentially existed between the two yards: anyone transferring to the other yard would lose his seniority. However, the Barney yard was small and was "exclusively concerned" with the loading of coal. The CT yard was much larger and handled a wide range of more complex activities. Most importantly "(t)he record reflects that there was significantly less opportunity for work and for promotion, and significantly greater possibility of lay-off at Barney than at the CT yard." 532 F.2d at 340. In Georgia Power only 7.2% of the company's employees were black and these were hired almost exclusively for the most menial and lowest paying jobs

in the company. Word of mouth recruiting within the company insured that the blacks would stay in those positions. In both cases the courts held the policies of the company to be discriminatory.

However, these cases must be distinguished from the Bobbie Brooks situation. In Norfolk & Western the lack of job security and the lack of opportunity for work and promotion were inherent in the Norfolk and Western employment scheme. The word of mouth recruitment policy "locked" the black employees into a discriminatory system of inequitable job opportunities. This is the crux of the racial discrimination in Norfolk & Western. In Bobbie Brooks no such inherent discrimination existed. Until the economic slump hit the company, both Solon and Kelley were equal with respect to pay, job promotion, and job security. Similarly, in Georgia Power the inequitable job

distribution system and its perpetuation by word of mouth recruitment is not present in this case. Thus, the hiring procedures and the no-transfer policy did not have a disparate impact on the Kelley employees.

Moreover, the no-transfer policy instituted in March 1971 was a business necessity. Bobbie Brooks needed a stable work force at Solon. Allowing transfers from Kelley to Solon would undermine the stability of the Solon work force. No Solon employee would be able to build up seniority. Bobbie Brooks' reliance on walk-in applicants insured that the company could quickly hire people with a present interest in working. Thus it could meet its immediate needs. Bobbie Brooks also stopped advertising in newspapers in late 1974, at approximately the time the business slump hit the company and lay-offs began. Obviously the need for advertising for employees had ceased

and would be counterproductive for the company. As the court in McAdory v. Scientific Research Instruments, Inc., 355 F. Supp. 468, 476 (1972) noted in dicta on business necessity: "It would be unreasonable for this court to expect the defendant to institute a...program which it cannot afford."

Next, plaintiffs allege that Bobbie Brooks' termination of the Kelley employees at the end of 1975 had a disparate impact on the black workers. Of the seventy-five people who were severed from Kelley, sixty-nine were black. Nobody from the predominantly white Solon plant was terminated. Whether or not the terminations had a disparate impact on the black Kelley employees, Bobbie Brooks established that the terminations were a business necessity.

By 1975, Bobbie Brooks' profits had fallen from $109,000 to a loss of over

$5,000,000. The company had undertaken various studies to minimize its losses. Those studies revealed that the Solon plant was the more efficient distribution center. At Kelley the labor cost per unit was 11.11 cents, which was more than what the planned cost was anticipated to be. At solon the labor cost per unit was 5.9 cents, which was less than what the planned cost was anticipated to be. Plans to improve Kelley, such as building a new distribution center or initiating new systems, were not as efficient as closing Kelley and moving the remaining departments to Solon. Bobbie Brooks would save $500,000 by doing so. This court holds that the company established that there was "an overriding legitimate business purpose" for their actions which was "necessary to the safe and efficient operation of the business." Robinson v. Lorillard Corporation, 444 F.2d

at 798.

Citing Lorillard, id., the plaintiffs argue that Bobbie Brooks did not prove business necessity because there were "alternative practice(s) (which) better effectuat(ed) the intended purpose or (were) equally effective but less discriminatory. Lorillard, id. n.7. Specifically, plaintiffs suggest that instead of terminating the Kelley employees, Bobbie Brooks could have merged the Kelley and Solon seniority lists or that whenever an opening occurred at Solon, Brooks could have recalled a Kelley employee. The court is not persuaded by the argument and holds that neither is an "acceptable alternative" which is required by Lorillard. In essence, plaintiffs ask this court to hold that a company in a precarious financial position must disregard a collective bargaining agreement and give an employee a job at a totally different

plant, represented by a different local with its own collective bargaining agreement.

Under the collective bargaining agreement after a year of lay-off an employee would lose his seniority and his other rights, and be terminated. The agreement also provided that there were no interplant rights. Nor did it require the company to pay severance. By the time the severance letters were sent out on December 31, 1975, twelve Kelley employees had already been on lay-off over a year and were thus already terminated. At the K-wing throughout 1976 no one was hired. Thus by the provisions of the contract all the plaintiffs would have been terminated. Bobbie Brooks had no obligation to hire the Kelley employees at the S-wing or to pay severance. Absent some obligation to hire at the S-wing, the court should not now require that there

was such an obligation under Lorillard. Plaintiffs do not cite any case under Lorillard which requires the employer to extend the employee's job rights at another plant. The cases that plaintiffs do cite are not controlling. Miller v. Continental Can Co., Inc., 13 F.E.P. 1585 (D.C. Ga. 1975) provides a remedy for a discriminatory system which prevented blacks from transferring to better jobs at the same plant. Smith v. Board of Public Instruction, 3 F.E.P. 194 (M.D. Fla. 1970), aff'd. 3 F.E.P. 197 (5th Cir. 1971) ruled on the specialized problem of tenured junior college professors and their rights when one campus of the junior college is forced to merge with two of the other campuses because of economic reasons. By paying severance Bobbie Brooks did more than it had to do.

Plaintiffs' final claim is based on 42 U.S.C. S 1981, which requires a

showing that a company's action was motivated by discriminatory animus. Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978) (citing Washington v. Davis, 426 U.S. 229 (1976): and Arnold v. Ballard, 448 F. Supp. 1025 (N.D. Ohio 1978).

Plaintiffs have not discharged their burden to prove that Bobbie Brooks' actions were motivated by discriminatory animus. The strongest evidence plaintiffs presented to show the discriminatory animus were several isolated incidents in which one white employee was allowed to move from Kelley to Solon and a number of blacks who inquired about transfers but did not do so. Richard Grejtak, wht white employee who transferred, was only a part-time employee who worked at most five hours a night. He was allowed to transfer to Solon. Polly Wright, despite some initial friction about her transfer to Solon, was permitted

to transfer. Rhoda Smith also request a transfer, but the company officials advised her that they though she could not handle the job, but suggested another job at Solon, which she did not want. This does not show discriminatory animu. Nor can discriminatory animus be attributed to the company by a supervisor mistakenly telling Dorothy Reeves that her job would not be the same at Solon, when a few days later Bobbie Brooks asked her to train new Solon employees. Nora Holden inquired about transfer, but was told: "You don't want to go out there." Helena Watson inquired about a transfer between 1972 and 1974, which was after the no-transfer policy had gone into effect. The company did not make an exception to that policy but did help her to find a better position for seniority pruposes at Kelley.

All plaintiffs are left with are one exception to the no-transfer policy made

for a part-time employee and one unexplained rebuff to a transfer query. That is not enough to show discriminatory animus.

The no-transfer policy, the terminations at the end of 1975, the recruitment policies, and the failure to rehire the severed employees because no applications were made all were done for reasons of business necessity and do not show discriminatory animus.

Moreover, the Supreme Court in Furnco Const. Corp. v. Waters, 438 U.S. at 580, 98 S. Ct. at 2951 held that the district court may consider the racial mix of the work force when determining motivation. The record shows throughout the history of the Solon plant, blacks were well represented. Bobbie Brooks offered the first positions there to blacks. Six or seven of the original twenty-seven positions were filled with blacks. From

April 1971 through January 1, 1976 fifteen percent of the employees at Solon were black. In 1975 the company asked blacks to work at Solon to eliminate a backlog and from January 1976 to August 1977, fifteen of the ninety-eight hired at Solon were black. Moreover the company paid severance to the Kelley employees when it had no such obligation. All these facts mitigate against the finding of discriminatory animus on the part of Bobbie Brooks.

Because the plaintiffs have not demonstrated that the policies of Bobbie Brooks were racially motivated - as required in a disparate treatment case under Title VII and section 1981 - or that the policies had a disparate impact which could not be justified by business necessity - as required in a disparate impact case under Title VII -

the court enters judgment for the defendant on all causes of action.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

NO. 81-3061

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARGE PAYNE, et al.,

Plaintiffs-Appellants, O R D E R

v.

BOBBIE BROOKS, INC.,

Defendant-Appellee.

_____/

BEFORE: KEITH and JONES, Circuit Judges and NEWBLATT, District Judge*

Plaintiffs appeal from a judgment for defendant in their action alleging race discrimination in employment. We affirm.

Defendant operated two distribution centers in northern Ohio, one at Kelley Avenue in Cleveland, the other in Solon while black Kelley employees were

*The Honorable Stewart A. Newblatt, United States District Court for the Eastern District of Michigan, sitting by designation.

on layoff constituted disparate treatment on the basis of race. The district court held that because they failed to apply for a position at Solon they failed to establish a prima facie case under McDonnell Douglas v. Green, 411 U.S. 792 (1973). Plaintiffs contend that applications were not necessary under the "futility doctrine" enunciated in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). We conclude, however, that the district court correctly held the futility doctrine inapplicable to the facts of this case.

Plaintiffs further contend that the district court erred in rejecting their claim of disparate impact. The district court held that to the extend defendant's actions had a disparate impact, they were justified by business necessity. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Upon consideration

of the briefs and oral arguments of counsel together with the record on appeal, we are compelled to agree with the district court.

Accordingly, the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Clerk

CERTIFICATE OF SERVICE

Three copies of the Petition for a Writ of Certiorari and Appendix have been furnished, by United States mail, first-class, postage prepaid, to Jack Ruzzico, Esq., 398 South Grant, Suite 211, Columbus, Ohio 43215, attorney for defendant, respondent, this _____ day of July 1982.

JAMES M. MANCINI
Attorney for Petitioners

Office - Supreme
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CLERK

No. 82-30

# In the Supreme Court of the United States

**October Term, 1982**

MARGE PAYNE, *et al.*,
*Petitioners,*

vs.

BOBBIE BROOKS, INCORPORATED,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ANDREW J. RUZICHO
*Counsel of Record*
398 South Grant Avenue
Suite 211
Columbus, Ohio 43215
(614) 221-8620

ALAN M. RAUSS
3830 Kelley Avenue
Cleveland, Ohio 44114
(216) 881-5300

GERALD KUKLAND
3830 Kelley Avenue
Cleveland, Ohio 44114
(216) 881-5300
*Attorneys for Respondent*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 881-5647

## QUESTIONS PRESENTED FOR REVIEW

I. Whether the courts below properly applied the standard this Court established in *McDonnell Douglas v. Green* requiring the filing of an application for employment as an element of a prima facie case in a hiring discrimination lawsuit, and, if so, whether a new exception to that standard should be adopted for these petitioners.

II. Whether the courts below correctly held that the "futility doctrine" exception to the application requirement, as enunciated by this Court in *Teamsters v. United States*, is not applicable to the facts of this case.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The respondent, Bobbie Brooks, Incorporated, respectfully requests that this Court deny the Petition For Writ of Certiorari to review the order of the Court of Appeals for the Sixth Circuit filed by the petitioners in this case.

## OPINIONS BELOW

The Court of Appeals' order is found in petitioner's Appendix, A 58-60. The opinion of the District Court is found at 505 F. Supp. 707 (N.D. Ohio, 1980).

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## STATUTES INVOLVED

The statutes involved in this case are Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.*, and 42 U.S.C. §1981.

## STATEMENT OF THE CASE

The respondent, Bobbie Brooks, Incorporated ("Brooks"), is engaged in the business of manufacturing and selling women's wearing apparel.[1] Petitioners were formerly employed by Brooks at the Brooks facility known as the Kelley Avenue Distribution Center ("Kelley"), a warehouse located on Kelley Avenue in Cleveland's inner city, adjacent to the company's corporate headquarters.

Petitioners were members of the International Ladies' Garment Workers' Union ("ILGWU"), Local 29. The terms and conditions of their employment were set forth in the collective bargaining agreement between Brooks and the ILGWU. The agreement was made up of both a national "master agreement" applicable to all of Brooks' union employees, and a separate "supplemental agreement" which established terms and conditions applicable to a particular facility, such as Kelley.

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1. On January 15, 1982, Brooks filed a petition for reorganization pursuant to Chapter 11 of the United States Bankruptcy Code. It is currently operating its business as debtor-in-possession, pursuant to 11 U.S.C. §1107.

Since 1962, the seniority system established pursuant to the Kelley Supplemental Agreement has provided, inter alia, that whenever Brooks determines that business conditions require a layoff, the worker in the group performing the actual work affected who has been employed for the shortest period of time (plant-wide) is the first to be laid off; recalls are in the inverse order. It has also provided that a laid off employee's right to be recalled continues for only one year after his layoff date. If he has not been recalled within that year he loses all of his benefits under the contract, including his seniority, and his employment is terminated. In addition, employees at one Brooks facility do not gain employment rights at any other facility. There has never been inter-plant bumping at Brooks; a more senior worker at one facility may not bump a less senior employee at a different facility. Throughout these proceedings it has been undisputed that the seniority system employed by Brooks at Kelley is a bona fide seniority system.

Late in 1970, Brooks determined that the expansion of its business and the further growth it was projecting had created an economic need for a second distribution center. After an unsuccessful search for additional space in the Kelley area, Brooks selected a location in Solon, Ohio, a suburb of Cleveland which is approximately 30 miles from Kelley. This second distribution center ("Solon") was opened in the spring of 1971.

Prior to the opening of Solon, in an effort to staff that facility with experienced workers, Brooks offered all of its Kelley employees, including the petitioners, an opportunity to elect to transfer to Solon. In a series of meetings with the Kelley workers, Brooks explained all of the advantages and disadvantages of such a transfer. Only three employees, two white and one black, transferred. None of the petitioners elected to transfer.

Thereafter, Brooks hired new employees to staff Solon. Of the first 26 or 27 employees hired at Solon, six or seven were black, including two black supervisors. The ILGWU placed the Solon workers in its Local 52, and both the company and union treated Solon as a facility separate and distinct from Kelley for all purposes. Separate seniority rosters were maintained for Solon and Kelley employees. Solon employees did not earn any seniority at Kelley, and Kelley employees did not have any seniority rights at Solon. A Solon Supplemental Agreement was executed, analogous to the Kelley Supplemental Agreement. The Solon seniority system contained the same kinds of provisions as the Kelley seniority system with respect to layoff, recall, etc. Its operation was entirely independent of the Kelley seniority system. The Solon system was a bona fide seniority system in its own right.

During the almost five year period from the opening of Solon through the end of 1975, there were no disputes relating to the company's operation of Kelley and Solon as separate facilities. Each of the two distribution centers operated smoothly and independently.

Late in 1974 Brooks began to experience a severe business decline. Net income fell from $109,000 for the year ending April 30, 1974 to a loss of $5,727,000 for the year ending April 30, 1975. As part of its effort to reduce costs, Brooks studied its distribution operations. It found that Solon was much more efficient than Kelley. The cost of shipping, per garment, was more than 32 cents at Kelley as compared with only 22 cents at Solon. This is a substantial difference, as Brooks was then shipping more than 10 million garments per year. The cost of occupancy at Kelley was almost $500,000 per year more than the occupancy cost at Solon. For these and other business reasons, late in 1975 Brooks decided that Kelley should be closed.

Prior to the time it decided to close Kelley, Brooks had already been forced to lay off many of its employees. Substantial layoffs occurred at Kelley, at Solon, and at other facilities around the United States. By August, 1975, sixty-seven Kelley employees, some of whom had been originally laid off in 1974, were on layoff.[2] Facing the completion of one year on layoff, and the contractually mandated termination of employment at that time, a number of these employees asked the union to attempt to obtain severance pay for them.

Beginning in late October, 1975, Brooks and the ILGWU met concerning the laid off Kelley employees. In addition to the union's demand for severance pay, which Brooks had no contractual obligation to pay, the parties also discussed the closing of Kelley. The resolution of these issues was that the 75 Kelley employees then on layoff, including several persons who had already finished one full year on layoff, would be terminated and paid severance pay, as of December 31, 1975.[3] The facility on Kelley Avenue would be closed and the 29 most senior Kelley employees, 15 of whom were black and all of whom were still actively

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2. Approximately thirty of the Kelley employees on layoff worked as temporary workers at Solon for three to six weeks during the September heavy shipping period in 1975. This work, which would normally have been performed by temporary workers obtained through employment agencies, ended when the backlog was alleviated. Two incidents involving a few of the petitioners occurred at Solon during this time. The petitioners attempted to characterize the incidents as "racial." The district court held that "Race was not a factor in these actions at the Solon plant." 505 F. Supp. at 711.

3. In addition to agreeing to pay severance, Brooks agreed to treat the terminations as if they had been caused by the closing of a plant (Kelley), and to cooperate with the former employees and the union in obtaining additional severance benefits from a union supplemental severance fund. These benefits, which were substantial, would not have been available if the terminations were simply the result of the completion of one year on layoff. The benefits were also not available to anyone who was reemployed by his former employer within six months of his termination.

working, would be moved with their work to a new location in Solon.[4] The Kelley unit would be maintained as a separate facility, in accordance with the existing labor agreements and practices. The new location came to be known as the "K Wing." The original Solon facility came to be known as the "S Wing."

The K Wing and S Wing distribution facilities continued to operate independently, just as they had operated before the Kelley Distribution Center was relocated to the K Wing. Local 29 continued to represent the employees in the K Wing and Local 52 continued to represent the employees in the S Wing. Each wing retained its own seniority list. There were no transfers between the K Wing and S Wing; nor were notices of openings in the S Wing posted in the K Wing, or vice versa.

In 1976 and 1977, there was some hiring at the Solon building, although the size of the work force remained essentially unchanged. Throughout this period sixty percent of the new hires were temporary; many working short days and weeks. Brooks often relied on employment agencies to supply these temporary needs. In 1976, not one person was hired in the K Wing.[5] In the S Wing in 1976 a total of fifty people were hired, but a total of sixty-six were terminated. In 1976 and 1977, a total of ninety-eight people were hired at Solon.[6] By stipulation

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4. The new location was in a separate part of the "U" shaped building which housed the original Solon Distribution Center. The original Solon facility was in one prong of the "U" and the new location was in the other prong. In the base of the "U" between the two prongs was another business. Thus, the two wings were physically separated.

5. There was *no turnover* in the K Wing; all of the K Wing employees had worked for Brooks for more than ten years.

6. This number does not include the 26 petitioners who accepted Brooks' offer of reemployment in August and September, 1977, when the company's business began to expand once again. This offer was extended to all of the petitioners. Including the rehired petitioners, 36 of the 122 persons hired at Solon in 1976 and 1977 (29.5%) were black.

the parties agreed that fifteen of these ninety-eight new hires were black. This 15.3% rate of employment of blacks compares favorably with the 15.5% representation of blacks in the work force in the Cleveland Standard Metropolitan Statistical Area ("Cleveland SMSA").

After the termination of their employment with Brooks at the end of 1975, *none* of the petitioners *ever* filed an application for employment at Solon with Brooks. All of the petitioners who testified at trial submitted written applications for employment with other companies subsequent to their termination, but not with Brooks. In addition, all of the petitioners knew, as a result of (i) their own experience in obtaining a job at Brooks; (ii) their knowledge of the company's employment practices, (iii) instructions from the union, and (iv) a letter agreement attached to the 1974 Kelley Supplemental Agreement, that if they wanted to be reemployed by Brooks they must file an application for employment. In fact, several of the petitioners had personally had the previous experience of being employed by Brooks, leaving the company, subsequently filing a new application for employment and then being reemployed.

Throughout the period of time in question, Brooks, like most other employers in the nation, required every applicant for employment to initiate the hiring process by filing a written employment application with the company. This procedure was followed without exception. A person arriving at either Kelley or Solon in search of employment would be given an application form to complete. The application did not contain any racial identification. The completed application would then be placed in a file, in chronological order. When Brooks needed to fill a vacancy the person doing the hiring would review the most current applications and interview applicants.

After the interview the most qualified applicant would be hired. With respect to each of the distribution centers, this procedure was required because Brooks generally needed the new distribution employee within one or two days. It was the company's experience that the most current applicants had indicated a present interest in a job, were available, and were less likely to be working elsewhere. It was not the company's practice to notify former employees of current job openings. As the District Court found, the filing of an application is an essential element of Brooks' hiring procedure. 505 F.2d at 713-714, n. 7.

There was a conflict in the evidence as to whether the union requested employment for the severed Kelley employees during 1976 and 1977. Union witnesses testified that they made such requests, but to no avail. This testimony was directly and positively denied by several company representatives. There is no dispute, however, that these conversations (i) never related to any particular named former employee, and (ii) were never directed toward any specific vacancy. In fact, there was no testimony as to the availability of any particular job at a time when Brooks was allegedly asked to rehire former employees.

It is also undisputed that none of the petitioners ever filed an application for employment at Solon. Some of the reasons the petitioners gave for not applying for jobs at Solon included not being interested in reemployment, preferring to work in downtown Cleveland, and receiving unemployment benefits in excess of the amount that could have been earned at Solon.

The petitioners have alleged that Brooks' hiring practices at Solon were racially discriminatory. These allega-

tions have been made in the face of the facts that in a community (Solon) where less than 1% of the population is black, and in a Standard Metropolitan Statistical Area (Cleveland SMSA) where 15.5% of the work force is black, Brooks has hired:

1. 15% black employees at Solon from the day it opened through January 1, 1976;

2. 15.3% black employees at Solon from January 1, 1976 through December 31, 1977, not including the petitioners who were rehired in 1977;

3. 29.5% black employees at Solon from January 1, 1976 through December 31, 1977, including the rehired petitioners;

4. A large number of temporary workers obtained through employment agencies, the majority of whom were black; and

5. More than 20% black employees at *all* of its facilities in the Cleveland SMSA during each year relevant hereto (1970 through 1977).

The District Court found that the petitioners did not establish a prima facie case of hiring discrimination under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), that the futility doctrine set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), did not apply to the facts of this case, and that the company's actions were grounded in business necessity, *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).[7] The Court of Appeals for the Sixth Circuit affirmed the decision on April 7, 1982.

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7. In this petition, the petitioners did not appeal the finding below on the issue of business necessity.

## REASONS FOR DENYING THE WRIT

### I. THE *McDONNELL DOUGLAS* STANDARD FOR PROVING A PRIMA FACIE CASE OF HIRING DISCRIMINATION HAS BEEN PROPERLY APPLIED BY THE COURTS BELOW AND IS NOT IN NEED OF MODIFICATION.

#### A. The Courts Below Correctly Held, As Have All Other Courts Considering the Question, That *McDonnell Douglas* Requires Proof of the Filing of an Application in a Hiring Discrimination Case.

The petitioners have asked this Court to modify its decision in *McDonnell Douglas v. Green, supra.* In that case, this Court held that in order to make out a prima facie case of hiring discrimination the petitioners must show (i) that they belong to a racial minority, (ii) that they applied for and were qualified for a job for which the employer was seeking applicants, (iii) that despite their qualifications they were rejected, and (iv) that after their rejection, the position remained open and the employer continued to seek applicants. Hundreds, perhaps thousands, of employment discrimination cases have been decided in accordance with *McDonnell Douglas.* This Court has reiterated the *McDonnell Douglas* test for establishing a prima facie case in *Teamsters v. United States, supra; Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978), *Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1978), and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981). Every Circuit Court of Appeals considering the issue has adhered to *McDonnell Douglas,* establishing an unbroken line of authority. *Tagupa v. Board of Directors,* 633 F.2d 1309 (9th Cir.

1980); *Marsh v. Eaton Corp.*, 639 F.2d 328 (6th Cir. 1981); *Alexander v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers*, 565 F.2d 1364 (6th Cir. 1978); *Taylor v. Mueller Co.*, 660 F.2d 1116 (6th Cir. 1981); *Johnson v. General Tire and Rubber Co.*, 652 F.2d 574 (5th Cir. 1981); *Jewett v. International Telephone and Telegraph Corp.*, 653 F.2d 89 (3rd Cir. 1981); *Omawale v. WBZ*, 610 F.2d 20 (1st Cir. 1979).

It is uncontroverted that not one of the petitioners herein applied for a job at Solon. As a result, they have failed to make out a prima facie case.

In addition to being a well established aspect of the law relating to hiring discrimination cases, the *McDonnell Douglas* application requirement is entirely logical and appropriate. Unless he is presented with an application for a job, an employer does not have an opportunity to either accept or reject the application, for permissible or impermissible reasons. In the absence of proof that the petitioners had applied for a job it would not be appropriate to allow them to assert that they had been unlawfully rejected for such position.

### B. There Is No Reason for This Court to Establish an Exception to the Application Requirement.

In an effort to excuse their admitted failure to fulfill the *McDonnell Douglas* application requirement, the petitioners are asking this Court to engraft a new exception to the standard.[8] They assert that, even though they have not actually applied for employment, *former employees*

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8. The only presently recognized exception is the so-called "futility doctrine" which was enunciated by this Court in *Teamsters v. United States*, *supra*. The inapplicability of the futility doctrine to the facts of this case is discussed in Section II of this brief.

should be automatically deemed to have applied for any job opening occurring subsequent to the termination of their employment, and that they should even be deemed to have filed such "applications" at facilities of their former employer at which they had never been employed. They further assert that when a union official, in a general way, asks an employer to rehire a large group of former employees, without naming any particular individual, without knowing whether any individual is available for or interested in reemployment, and without regard to whether the employer had any available jobs at that time, "applications" have been filed by each of the former employees.

There is no reason for this Court to establish such an exception. Nothing contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, 42 U.S.C. §1981, or any case cited by the petitioners would even suggest that a former employee should be treated differently from any other applicant. Rather, in a hiring discrimination case the inquiry must be, simply stated, whether qualified applicants for a job were denied employment because of their race. The applicants must take some action to indicate to the employer that they possess a present interest in a position. The employer must then react to the action taken by the applicants. This is the way the hiring process actually works, and this reality is adequately reflected in the *McDonnell Douglas* standard. It requires no modification.

### C. The Change in the *McDonnell Douglas* Standard Sought by the Petitioners Would Not Change the Outcome of This Case.

The petitioners are asking this Court to modify a well established legal standard when they ask for a new exception to the *McDonnell Douglas* application requirement.

Brooks submits that even if such an exception is created, it would not change the outcome of this case.

Assuming, arguendo, that the Court holds that the petitioners should be deemed to have applied for jobs as a result of the requests for jobs allegedly made by their union representative, the petitioners would have then made out a prima facie case of hiring discrimination. However, as this Court held in *Furnco Construction Corp. v. Waters, supra*, "a prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." The Court went on to say that once a prima facie case has been established, "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, not an illegitimate one such as race." 438 U.S. at 577. Furthermore, in *Teamsters v. United States*, this Court held that proof of discriminatory motive is essential in a disparate treatment case. 431 U.S. at 335, n. 15.

In this case, the courts below have already explicitly held (i) that the petitioners have not demonstrated that Brooks' policies were racially motivated, and (ii) that these policies, including the company's hiring practices, were justified by business necessity. As a result, even if the petitioners can convince this Court to modify a well established and consistently applied standard as to the need for filing an application in order to establish a prima facie case, the result in this case would remain unchanged.

### D. The Issues Raised Are of No National Importance.

The petitioners propose that the application requirement can be met by such things as general comments from

union representatives and inferences of interest in re-employment from the fact that they had been fired and from their requests for references. This standard, if adopted, would allow *these petitioners* to make out a prima facie case. It would be of little importance to anyone else, however. Other people make direct contact with a prospective employer when they are interested in a job. Other people complete employment applications when they know that the employer hires from applications on hand. Other people, in short, initiate the hiring process by applying for a job.

## II. THE COURTS BELOW CORRECTLY HELD THAT THE "FUTILITY DOCTRINE" IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

### A. In Order to Invoke the Futility Doctrine Petitioners Must Have Proved That They Would Have Applied but for Discrimination and That They Would Have Been Discriminatorily Rejected.

In *Teamsters v. United States, supra*, this Court set forth one exception to the *McDonnell Douglas* application requirement, the so-called "futility doctrine." In *Teamsters*, the Court stated:

> A consistently enforced discrimination policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. 431 U.S. at 365.

But the Court immediately explained this statement by using as an example an employer who places a "whites only" sign on the hiring office door, and who has a history of providing unequal employment opportunities. The Court stated:

> If an employer should announce his policy of discrimination by a sign reading "whites only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practice - by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of the work force from which he has discriminatorily excluded members of minority groups. 431 U.S. at 365.

The Court went on to say that for nonapplicants to prevail two distinct elements of proof are required. In order to invoke the futility doctrine they must demonstrate (i) that they would have applied but for discrimination, and (ii) that they would have been discriminatorily rejected had they applied. 431 U.S. at 365, n. 52.

### B. There Is No Evidence in This Case in Support of Either Element of the Futility Doctrine.

The petitioners did not adduce any evidence as to either of the two elements of the futility doctrine. As to the first element, i.e., that they would have applied but for discrimination, not one petitioner testified that he did not apply because of racial discrimination.[9] What the evidence does demonstrate is that Brooks *did* hire blacks at Solon. At least 15% of the Solon work force was black at all rele-

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9. Several petitioners testified at trial that their reasons for not applying included, "working elsewhere," "unemployment compensation paid better," and "wanted to work downtown." The fact that most of the job vacancies were temporary suggests another reason for failure to apply.

vant times, and as much as 29.5% of the Solon hires in 1976 and 1977 were black, at a facility located in a city with a black population of 1% and in an SMSA with a black work force of 15.5%. These statistics argue against any intent to discriminate. *Furnco Construction Corp. v. Waters, supra.* Clearly, these facts describe an employer who has a history of regularly and consistently employing black workers. They do not describe an employer who places a "whites only" sign on the hiring office door. The petitioners have not proved the facts which are required in order to invoke the futility doctrine.

All petitioners were aware of the necessity of filing an application, and several had the experience of being terminated, reapplying for a job with Brooks at a subsequent time, and being rehired. Several petitioners had applied initially with Brooks on the advice of friends or relatives, and many petitioners told friends or relatives to apply for a job with Brooks, and they were hired. Union officials suggested to some of the petitioners that they reapply at Solon after their terminations at Kelley in December, 1975, but none did.

Brooks submits that there is not one scintilla of evidence in this record that the petitioners would have applied for jobs at Solon but for racial discrimination.

Regarding the other element of the futility doctrine, i.e., proof that the petitioners would have been discriminatorily rejected had they applied, once again there is no evidence in the record to support this allegation. Had the petitioners, or some of them, applied at Solon for temporary vacancies, based upon Brooks' past practices, hiring record, and the petitioners' own past experience with Brooks, it is likely that they would have been rehired. As the district court held, the "futility must be caused by

discrimination, not an apparent lack of jobs," and in this case "there was not the requisite discrimination." 505 F. Supp. at 717.

From the foregoing, it is clear that the petitioners have failed to establish that the futility doctrine is applicable to this case.

## CONCLUSION

The petitioners have not set forth any substantial reason for this Court to grant their writ, either under the *McDonnell Douglas v. Green* standard for establishing a prima facie case in hiring, or under the *Teamsters v. United States* standard for establishing the futility doctrine. There are no conflicting decisions on either issue, and there are no compelling reasons for granting the writ. Therefore, the respondent prays that the Court deny the petition for certiorari in this case.

Respectfully submitted,

ANDREW J. RUZICHO
*Counsel of Record*
398 South Grant Avenue
Suite 211
Columbus, Ohio 43215
(614) 221-8620

ALAN M. RAUSS
3830 Kelley Avenue
Cleveland, Ohio 44114
(216) 881-5300

GERALD KURLAND
3830 Kelley Avenue
Cleveland, Ohio 44114
(216) 881-5300
*Attorneys for Respondent*